LIBRARY

> Since we are not a reviewing court, we are not permitted to pass upon errors or mistakes in judgment unless they are so flagrant as to make the action of a regularly formulated military tribunal null and void, or to deprive it of jurisdiction once it has been regularly constituted.
>
> * * * * *

We think that case remains a valid precedent on its facts, though in view of all the water that has flowed under the bridge since 1956, and all the variegated attempts to define the scope of collateral review of court-martial convictions that have ensued, we do not attempt to determine whether we would now define the limits exactly as stated there. The inapplicability of finality language to that case is not a factor weakening its effect as a citation by defendant here.

We have also considered *United States* v. *Lovett*, 7 U.S.C.M.A. 704, 23 C.M.R. 168 (1957); *United States* v. *Faylor*, 9 U.S.C.M.A. 547, 26 C.M.R. 327 (1958); and *United States* v. *Young*, 10 U.S.C.M.A. 97, 27 C.M.R. 171 (1959). All three involved alleged conflicts of interest in the representation of a pair of accused by the same assigned defense counsel in courts-martial, and in the first two cases the convictions were reversed on that ground, but the conflicts were far more substantial and palpable than they are here. In *Lovett*, the other man was a prosecution witness. In *Faylor*, counsel told the court on behalf of the other man that Faylor was the ringleader. It does not appear from these cases that the Court of Military Appeals would sweep a real conflict of interest under any rug. It regards it, as we do, as raising a constitutional problem. But neither is it willing to conjure up imaginary and hypothetical conflicts, of a nature that would effectively preclude the same defense counsel from ever representing two or more co-defendants. See *Lovett*, *supra*, at p. 707. We would suppose that co-defendants, who are cooperating, and not seeking to exculpate themselves by incriminating one another, would often derive advantages from sharing counsel in common which it would be unjust to take away. Yet the rule urged on us here would have that effect, because even the expressed wish of defendants to be represented in common would have to be disregarded.

# In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 392

ROBERT G. GALLAGHER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the Court of Claims (Pet. App. A) is reported at 423 F. 2d 1371.

### JURISDICTION

The judgment of the Court of Claims was entered on April 17, 1970. The petition for a writ of certiorari was filed on July 14, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

### QUESTIONS PRESENTED

1. Whether the holding in *O'Callahan* v. *Parker*, 395 U.S. 258, precluding trial by court-martial of non-"service-connected" offenses applies to a court-martial conviction of a serviceman stationed in Germany for the off post robbery of a German civilian.

2. Whether the court below properly rejected petitioner's constitutional contention that he had received ineffective assistance of counsel at his court-martial trial.

## STATEMENT

While on active duty as a soldier in the United States Army stationed in Germany, petitioner was tried before a general court-martial on charges of robbing a German citizen. Petitioner, represented by appointed military counsel, admitted striking the victim and pleaded guilty to the lesser included offense of assault, but pleaded not guilty to the charge of robbery. In December 1963, the court-martial found petitioner guilty of robbery as charged and sentenced him to a bad conduct discharge from the Army, to forfeit all pay and allowances, to be confined at hard labor for one year and to be reduced in rank to the lowest enlisted grade. After petitioner had served about nine months of that sentence, the remainder of the sentence and the bad conduct discharge were remitted by the Secretary of the Army, and petitioner was returned to duty. In August 1965, he was honorably discharged from active duty.

In the interim, petitioner's conviction was approved by the officer who convened the court-martial and automatically reviewed by a Board of Review as required by Article 66 of the Uniform Code of Military Justice, 10 U.S.C. 866. The Board affirmed the court-martial's findings and approved the sentence as modified by the Secretary of the Army. On reconsideration, the Board reaffirmed its decision.

Petitioner then sought review of the Board's decision in the Court of Military Appeals. On consideration and reconsideration, that court denied review. *United States* v. *Gallagher*, 15 U.S.C.M.A. 391, 675, 35 C.M.R. 363 (1965). Thereafter, petitioner sought injunctive and other relief against the judges of the Court of Military Appeals in the federal courts, challenging the constitutionality of the review procedure under Article 67(b) of the Uniform Code of Military Justice, 10 U.S.C. 867(b), which requires that the Court of Military Appeals review all cases affecting general or flag officers, but does not require review of other cases unless the sentence is death. The court of appeals rejected the challenge. *Gallagher* v. *Quinn*, 363 F. 2d 301 (C.A.D.C.), certiorari denied, 385 U.S. 881.

Petitioner also applied to the Army Board for Correction of Military Records to have the court-martial conviction expunged from his records and to recover the pay and allowances forfeited by the conviction, but again was unsuccessful in obtaining relief. As a final resort, petitioner brought the instant suit for back pay in the Court of Claims, seeking to recover the pay which he had lost as a result of his court-martial conviction. As he had done before the Board of Review, in the Court of Military Appeals, and before the Army Board for Correction of Military Records, petitioner asserted below that he had been denied the effective assistance of counsel at his court-

martial, which rendered his conviction and sentence void.[1]

The proceedings below were suspended pending this Court's decision in *United States* v. *Augenblick*, 393 U.S. 348, on the authority of the Court of Claims to review collaterally court-martial trials. Thereafter, cross-motions for summary judgment were filed, but before oral argument on these motions was heard, this Court decided *O'Callahan* v. *Parker*, 395 U.S. 258. Petitioner thereupon added to his motion for summary judgment the additional ground, urged for the first time in the six-year history of review proceedings before military and civilian courts and other bodies, that the court-martial lacked jurisdiction to try him for a non-service-connected offense.

The Court of Claims denied petitioner's motion for summary judgment and granted the government's

[1] Petitioner stated in substance that his appointed military counsel had also defended his co-accused, Pfc. Hughes, in a separate, prior general court-martial. Petitioner asserted that this denied him due process of law because it precluded counsel from raising the defense that Hughes alone was guilty of the robbery. The government's response was: (1) that Hughes was separately tried first and convicted of the lesser included offense of larceny; (2) that Hughes testified at petitioner's trial as a witness called by petitioner's counsel; and (3) that in his testimony Hughes accepted entire responsibility for the theft, stating that he took the victim's wallet without petitioner's knowledge.

Petitioner also asserted that his defense counsel failed to call character witnesses in his behalf at the separate sentencing portion of the court-martial, that is, after his guilt had been determined. The government's response stated that the defense counsel decided against doing so upon learning that the prosecution had witnesses who would give testimony unfavorable to the petitioner in rebuttal.

motion. The court held, *first*, that the rule of *O'Callahan* does not apply to offenses committed by servicemen in foreign countries, and, *second*, that petitioner's claim that he had not received effective assistance of counsel was fully and fairly considered by the military tribunals and that any alleged errors did not rise to a constitutional level as defined in *United States* v. *Augenblick*, *supra*.

## ARGUMENT

1. Petitioner contends that the decision below interpreting the scope of *O'Callahan* v. *Parker*, *supra*, involves an important constitutional issue meriting consideration by this Court (Pet. 6). While the issue presented is important, the court below correctly concluded that *O'Callahan* does not apply to offenses committed by servicemen in foreign countries. Moreover, the issue was presented to this Court last Term in *Swift* v. *Commandant*, but certiorari was denied, 396 U.S. 1028. See Memorandum for the United States, No. 391 Misc., 1969 Term. No purpose would thus be served by further review of this case.

In *O'Callahan*, this Court held that the Fifth Amendment's exception of "cases arising in the land or naval forces" from the requirement of prosecution by indictment and the right to trial by jury applies only to military offenses which are "service connected." In consequence, the military could not, consonant with the Fifth Amendment, subject a serviceman within the territorial limits of the United States and in time of peace to trial by court-martial for an offense cognizable in a civilian court where the offense had no military significance. The Court also

a test that O'Callahan did not commit the offenses for which he was court-martialed in "an armed camp under military control, as are some of our far-flung outposts," or "in the occupied zone of a foreign country" (395 U.S. at 273–274).

Here, the offense was committed in the territory of a foreign state where large contingents of our armed forces are stationed. The general principle of international law is that visiting forces are subject to the jurisdiction of the host state except as the latter may agree otherwise. See *The Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 135; cf. *United States* v. *Flores*, 289 U.S. 137, 158–159; *S.S. Lotus*, P.C.I.J., Ser. A., No. 10 (2 Hudson, *World Court Reports* 23, 82). Were it not for a series of treaties—the so-called "status of forces agreements"—American servicemen committing offenses abroad would be tried exclusively in the tribunals of the host state.

The alternative to trial by courts-martial of offenses committed off post by servicemen stationed in countries, such as Germany, with which we have status of forces agreements would ordinarily be trial by foreign courts, as such countries under the agreements waive jurisdiction over off post offenses on the condition that the offender be tried before a military court. At all events, a serviceman convicted by a court-martial has, in an appropriate case, a constitutional right to petition the federal courts for a writ of habeas corpus, and to take his case ultimately to this Court: *Burns* v. *Wilson*, 346 U.S. 137; *Noyd* v. *Bond*, 395 U.S. 683. If the armed forces were held to lack court-martial

jurisdiction in cases such as the present one, the accused serviceman would not only be denied the safeguards and the broad appellate review provided by Congress, but in addition, would be denied all opportunity to resort to American civil courts. See *United States* v. *Dalles*, 222 F.2d 390 (C.A.D.C.), certiorari denied, 348 U.S. 952.

The weakness of petitioner's position is made clear in the following passage from the opinion below (Pet. App. A 5):

> Thus it appears that plaintiff is asking us to exhibit our zeal for the Bill of Rights by holding that the protection of our Bill of Rights must be utterly withdrawn from servicemen stationed in foreign countries, whenever they are charged with offenses in the concurrent class. We say this, of course, not meaning to raise any hobgoblins about Germany, which has a highly developed system of jurisprudence, with its own system of safeguarding the accused. But we may notice judicially that our servicemen are stationed also in other countries, some of which have a reputation for harsh laws and savagely operated penal institutions. We are supposed to do this to defend the jury system, but counsel are unable to advise that jury trials are accorded to persons tried even under Germany's enlightened criminal statutes.[2]

---

[2] As in our view the rule of *O'Callahan* should not be extended to cover this case, there is no reason to withhold consideration of the petition pending a decision by this Court in *Relford* v. *Commandant*, No. 98, this Term, certiorari granted 397 U.S. 934, on the question of whether *O'Callahan* should be applied retroactively.

2. Petitioner also urges (Pet. 7–10) that the decision below, in limiting collateral review of his court-martial conviction, conflicts with *Kauffman* v. *Secretary of the Air Force*, 415 F. 2d 991 (C.A.D.C.), certiorari denied, 396 U.S. 1013. While it is true that the two decisions may be in conflict as to the appropriate standard of review to be applied, the Court need not reach that issue as the decision below can be sustained on the merits.

The questions of the jurisdiction and scope of collateral review by civilian courts of military trials are closely akin to those presented but not decided in *United States* v. *Augenblick*, 393 U.S. 348; they were again summarized by us last Term in opposing the petition for a writ of certiorari in *Kauffman* v. *Secretary of the Air Force*, *supra*.[1] Here again, however, as in *Augenblick* and *Kauffman*, the Court need not decide these questions. Although the court below articulated a narrow standard of review, it is clear from the court's detailed discussion of the record that petitioner was not denied the effective assistance of counsel at his court-martial and that even under the *Kauffman* standard of review his conviction must stand. As the decision below was thus correct on the merits, there is no occasion for further review by this Court.

---

[1] See Brief for the United States, No. 45, October Term, 1968, pp. 49–62.

[2] See the government's Brief in Opposition, No. 766, October Term, 1969, pp. 14–16.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*

WILLIAM D. RUCKELSHAUS,
*Assistant Attorney General.*

MORTON HOLLANDER,
BRUNO A. RISTAU,
*Attorneys.*

AUGUST, 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970